IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Northern District of California

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JURISDICTIONAL STATEMENT

Appellants, Household Goods Carriers' Bureau, Allied Van Lines, Inc., North American Van Lines, Inc., Bert Hussey, d/b/a Hussey's, A. L. Chipman, d/b/a Goodwin Moving and Storage Co., United California Express and Storage Co., d/b/a U. C. Express and Storage Co., and Von Der Ahe Van Services, Inc., d/b/a

Bentley's Inc., appeal from the judgment of the United States District Court for the Northern District of California entered on June 10, 1968, dismissing a complaint against a report and order of Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court has not yet been reported in the Federal Supplement, but copies of the opinion and order as released by the Court are attached hereto as Appendix A. A copy of the decision and order of the Interstate Commerce Commission in Docket No. MC-C-4455, and related cases, *Kingpak, Inc., Investigation of Operations,* dated December 8, 1966, and served January 5, 1967, reported at 103 M.C.C. 318, is attached as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 to enjoin and set aside the decision and order of the Interstate Commerce Commission (Appendix B). The judgment of the United States District Court for the Northern District of California was entered on June 10, 1968, and Notice of Appeal was filed in that Court August 8, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by §§ 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of this case on direct appeal: *United States* v. *Drum,* 368 U.S.

370 (1962); *American Trucking Associations* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant statutory provisions are the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; and the following sections of the Interstate Commerce Act: Section 207 [49 U.S.C. § 307], Sections 402(a)(5) and (6) [49 U.S.C. § 1002(a)(5) and (6)], 402(b), 404(d), and 418 [49 U.S.C. § 1002(b), 1004(d), 1018] and Sections 5 and 10(e) of the Administrative Procedure Act [5 U.S.C. §§ 554 and 706]. They are set forth verbatim in Appendix C attached hereto.

QUESTIONS PRESENTED

1. Has the Court erred in holding that when the single shipment of one freight forwarder is joint-loaded with the single shipment of one or more other freight forwarders for the purpose of tendering the combined shipment for line-haul transportation the statutory requirement for consolidation has been met?

2. Has the Court erred in holding that the requirements of the statutory definition of a freight forwarder are satisfied whenever (1) an actual freight forwarder service is being performed and (2) any portion of the through movement, even if it be before consolidation, takes place within the United States?

3. Has the Court erred in holding that the articulation by the Commission of a set of guidelines was an adequate disposition of the consolidated proceeding consisting of a complaint alleging unlawful operations, a petition seeking a declaratory order respecting the

lawfulness of existing operations, and an investigation on the Commission's own motion into the lawfulness of the operations of specifically named respondents?

4. Has the Court erred in holding that it is premature to review the announced intention of the Commission to hold oral hearings upon forwarder-related applications for motor carrier operating authority if requested by applicants but only upon a showing of good cause if requested by protestants?

STATEMENT OF THE CASE

On May 22, 1961, United Van Lines, Inc., a motor carrier of household goods operating pursuant to the authority and under the regulation of the Interstate Commerce Commission, filed a complaint with the Commission alleging that four claimants to be exempt forwarders of household goods were not in fact forwarders and were operating in violation of law. On May 11, 1964, the Household Goods Carriers' Bureau, an association of motor carriers of household goods, filed with the Commission a petition for a declaratory order resolving the lawfulness of operations by a large number of purported forwarders of household goods. On May 20, 1964, the Commission instituted its own investigation into the lawfulness of the transportation of household goods by 13 "principal respondents" claiming to be exempt forwarders and 28 "secondary respondents" engaged in furthering or assisting in the performance of the operations of the 13 "principal respondents". The three proceedings, i.e., the complaint, the petition, and the investigation, were thereafter consolidated and extensive hearings were held.

By order dated December 8, 1966, the Commission dismissed the complaint, denied the petition, and dis-

continued the investigation, all without making any finding respecting the lawfulness of the operations of any specific respondent or defendant even though in its report accompanying that order, it stated that such a determination was "essential" to a decision in each of the proceedings before it.

In the same report, the Commission announced several interpretations of Part IV of the Interstate Commerce Act which are at variance with the consistent view taken of that portion of the Act over the quarter of a century of its existence. The net result of the Commission's order was to leave undisturbed the operations of a large group of claimants to exemption under the Interstate Commerce Act even though those operations were conducted in competition with the operations of the motor carriers of household goods. Among the novel interpretations by the Commission were the following:

1. The statutory requirement of a consolidation of shipments as a necessary incident of a forwarder's operations can be satisfied by the joint-loading of a single shipment of one forwarder with the single shipment of one or more other forwarders.

2. The statutory requirement of consolidation and break bulk can be satisfied by the performance of those functions at a port of the United States or at a point outside the United States wholly without any necessity for a movement of the consolidated lot within the United States.

In addition to the foregoing, the Commission's report also held that applications of motor carriers for the operating authority necessary to supply the purported forwarders with services in terminal areas would

be granted upon a showing of past operations and without holding oral hearings even though such might be requested by protestants.

Appellants, who were litigants before the Commission, filed a complaint in the United States District Court for the Northern District of California in Civil Action No. 47646 to annul and set aside the report and order. On June 10, 1968, the District Court sustained the Commission's action and dismissed the complaint. (Appendix A).

THE QUESTIONS ARE SUBSTANTIAL

1. The resolution of the issues raised by this appeal could well determine under which mode of transportation a substantial portion of the nation's freight traffic will in the future move. If an entrepreneur is able to achieve freight forwarder status merely by combining a single shipment which he has undertaken to handle for a shipper with the single shipment of another entrepreneur in a similar posture, then the means have been provided to destroy the efficacy of regulation of the physical carriers. The proliferation of such "instant" forwarders and the capture by them of desirable freight may well force the motor carriers into a satellite status *vis-a-vis* the forwarders. The Interstate Commerce Act authorizes the latter to contract with motor carriers at other than tariff rates for most of the physical services for which a forwarder must use a regulated motor carrier. Thus, there would be created a situation in which interposition of a third party would take place between the shipper and the physical carrier to the detriment of the latter and to the detriment of the total transportation service available to the public at large.

Let it not be said that the Interstate Commerce Commission would still have control of the situation through its jurisdiction to grant or withhold freight forwarder operating authorities. The case here is one in which the operations of the third parties are exempt from regulation if, indeed, they satisfy the definition of freight forwarding, but the Commission has already demonstrated its willingness to grant authorization for regulated freight forwarding on the very same basis as has been approved in the *Kingpak* case. (*Routed Thru-Pac, Inc., Freight Forwarder Application,* 332 I.C.C. 352 (1968)).

The Court's acceptance of the phenomenon of joint-loading as a statutorily acceptable substitute for the forwarder function of consolidation is a sharp departure from past Commission practice and is in derogation of the intent of Congress when it defined the forwarding operations to be regulated by the Commission under Part IV of the Interstate Commerce Act. The legislative history of Part IV embraces proceedings before two Congresses—the 76th and the 77th. Insofar as the ultimate definition of freight forwarding and the intent of Congress to identify the transportation thus brought under regulation are concerned, the hearings on H.R. 3684 in the 77th Congress are the most fruitful source . Although the Senate bill S.210 was ultimately passed and became Part IV of the Interstate Commerce Act, this occurred only after substitution of the substantive provisions of H.R. 3684 for the prior wording of S.210.

In its original form, S.210 carried a provision [§ 408 (a)] which prohibited any freight forwarder from contracting with another freight forwarder "for the pooling or division of traffic, or of service, or of gross

or net earnings, or of any portion thereof" without approval of the Interstate Commerce Commission that such pooling "will be in the interest of better service to the public or economy in operation, and will not unduly restrain competition * * *". This entire provision was eliminated in favor of a provision in H.R. 3684 [1] which, taking the form of section 410(i) of that bill then read as follows:

> "Nothing in this part shall be construed to prohibit any freight forwarder from entering into an agreement with another freight forwarder for the joint loading of traffic between points in any transportation subject to this part, where transportation between such points is authorized by the certificate of each such freight forwarder."

Although subsequently the certificate provisions of H.R. 3684 were eliminated, necessitating a revision of section 410(i) as above, the plain import of what is now section 404(d) of the Interstate Commerce Act [49 U.S.C. § 1004(d)] is that joint loading is a permissible practice only after forwarder status has been achieved.

It must here be recognized that in the Commission's decision, sustained by the Court from which this appeal is taken, the Commission held that the provisions of section 404(d) have no relation to the question of whether joint loading may be practiced as a means of effecting the consolidation necessary to qualify as a forwarder in the first instance. By so doing, the Commission has followed the extraordinary reasoning that a practice permissible between regulated forwarders

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[1] Introduced in the House of Representatives some two months after S.210 had been introduced in the Senate.

and subject to the Commission's approval, may be freely indulged in as a means of qualifying for the status of forwarder. The intent of the framers of the legislation was plainly otherwise.

The principal witness of the forwarders who spoke in great detail on all of the various proposals before the Congress was Mr. W. J. H. McEntee who appeared for the Freight Consolidators and Forwarders Institute.[2] In the course of his testimony, Mr. McEntee had occasion to discuss the predecessor of present section 404(d) of the Interstate Commerce Act and he said:[3]

> "I have to explain a slight difference between the proposed sections of H.R. 3684, and parts I, II and III. There is no provision for joint rates as between freight forwarders themselves.
>
> "The bill provides instead, the practical method of cooperation between forwarders, which has continued for some time, and which has produced both a higher degree of service to the public, and an economy in cost, which also make for public interest. Section 410(i) specifically authorizes the practice of forwarders to joint load their traffic between points, when each forwarder, party to the arrangement is authorized by certificate to serve both such points. Thus, by a concentration of the traffic of two or more forwarders, more frequent sailings, with a wider degree of coverage, with an economy in cost and with an economy in the use of equipment, are maintained, to the public's benefit."

It seems clear from the foregoing that in Mr. McEntee's mind the joint loading provision had no rele-

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[2] Hearings on H.R. 3684 before the House Committee on Interstate and Foreign Commerce, 77th Congress, First Session, pp. 57-178, (1941).

[3] *Ibid.*, p. 142.

vance to the definition of a forwarder, but was added to the bill to permit forwarders who had already qualified as such and received their certificates as such to pool their traffic moving in their authorized services (and limited to such already authorized services) in order to achieve maximum efficiency and economy. Certainly if the Institute had intended the bill to encompass in the definitional section this practice which had "continued for some time", it could have easily drafted language for the definition of a forwarder which would have made this clear. Moreover, if that had been the intent, it could logically be contended that there would have been no need for the separate provision of Section 410(i) and, at the very least, if this had been the intent, it is logical to assume that some such statement would have been made in connection with the definitional standards and, particularly, with respect to the grandfather provisions and the requirements for proving public convenience and necessity. No such statement was made. To the contrary, the colloquy between Congressman Reece and Mr. McEntee immediately following Mr. McEntee's statement concerning the joint-loading provision indicates a much different intent:

> Mr. Reece: ". . . I would like to ask you if you feel that the same circumstances would enter into determining convenience and necessity in case of a forwarder as would in the case of some other transportation agency?
>
> Mr. McEntee: "I should think, Mr. Reece, the same determination and the same elements of proof would be required."[4]
>
> * * *
>
> Mr. McEntee: ". . . The success, therefore, of forwarding operations depends entirely upon the

[4] *Ibid.*, p. 143.

ability to concentrate [traffic]. To the degree that that ability is taken away through the diffusion of the same traffic over a number of forwarders, the degree of service suffers accordingly. . . .

Mr. Reece: [The Congressman became concerned that there would be a tendency to end up with the pooling of all forwarder traffic in one "forwarding agency who would have control of the routing of the traffic" under the certificate of public convenience and necessity approach. The Congressman wondered that if this were so maybe Congress should recognize that and deliberately achieve it by appropriate language in this legislation.]

Mr. McEntee: "We have provided, if you recall, the last thing I said on the previous section, the mechanical means under which that could be accomplished in accordance with the provisions of the statute, by making it possible for the freight forwarders to voluntarily enter into agreements with other freight forwarders looking toward the combination of their service movements and their traffic movements for the best service.

"We provide the mechanical means by the provisions of the statute.

"Now the use that will be made of that mechanical means is, of course, voluntarily as between the freight forwarders, but it is equally as certain that the law of supply and demand will force the most acceptable and profitable use of the terms and provisions of that statute."[5]

Again, it is hard to explain this colloquy in any other way than that in Mr. McEntee's opinion joint loading was neither embraced in the definition of a forwarder nor, more particularly, in the authority to be received by the forwarder (as so defined) in its certificate of

[5] *Ibid.*, pp. 144-145.

public convenience and necessity, but, rather, was a practice that required specific, additional authorization. In this context, the "grandfather" clause for granting certificates obviously becomes significant. For if joint loading was intended to be embraced in the definition of a forwarder as satisfying the criteria of consolidation and break-bulk, then one would have expected some discussion of that fact by Mr. McEntee in connection with the "grandfather" provisions and there is none.[6] Moreover, any such interpretation of joint loading would rather obviously have been contrary to Mr. McEntee's antipathy to "the diffusion of the same traffic over a number of forwarders."

2. With respect to the second question raised by this appeal, the Court's holding is also at odds with the legislative history of Part IV of the Interstate Commerce Act. As the Court's opinion shows, the Commission has in the past granted forwarder permits to applicants engaged in foreign commerce where either the assembly and consolidation or the break-bulk and distribution has taken place in a foreign land. In every such instance, however, the counterpart of the considered function has taken place in the United States with the added feature that at least a part of the line haul has also occurred within the United States. The Court in this case, however, has held that the doctrine of satisfying the statutory definition of freight forwarding by operations outside the United States may be stretched to include an operation in which the only physical movement within the United States takes place before consolidation or after break-bulk. The legislative history of the freight forwarder legislation is to the contrary.

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[6] *Ibid.*, pp. 173-174.

H.R. 3684, 77th Congress (1941), carried as section 402(a)(6) the following definition of the term "interstate or foreign commerce" as used in the bill:

> "The term 'interstate or foreign commerce' means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) between points in the same State but through any place outside thereof; or (C) between any point in the United States and any point outside thereof, but only (i) insofar as such transportation takes place from any point in the United States to any other point therein, prior to transshipment at a place within the United States for a movement to a place outside thereof, and (ii) insofar as such transportation takes place from any point in the United States to any other point therein, after transshipment at a point within the United States in a movement from a place outside thereof."

The meaning of the term "interstate commerce" is of paramount importance in this case because the only freight forwarding which is subjected to regulation by the Commission is that which takes place in interstate commerce as defined.[7] It is of great significance, therefore, that the report of the House committee[8] made it plain that the intent of Congress was to leave outside the ambit of the new regulation a forwarding operation in which the performance of the entire line-haul occurs outside the United States. The committee said:

> "Definition of 'Interstate or Foreign Commerce'
>
> "The term 'interstate or foreign commerce' was written with a view to covering the operations of a

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[7] See section 402(a)(5).

[8] H.R. Report No. 1172, 77th Congress, First Session 6 (1941).

> freight forwarder, as defined in section 402(a)(5), insofar as they are carried on between points within the United States, even though the ultimate destination is a point in a foreign country, or the point of origin is in a foreign country. It does not, however, cover that part of a freight forwarder's operation performed beyond the port of embarkation or debarkation."

As above explained, the provisions of H.R. 3684 ultimately were enacted as S.210 after the substitution of them for provisions in the Senate bill. Section 402(a)(6) was modified only slightly by the Committee of Conference which felt impelled to explain the change. The report of the Committee [9] reads in that regard as follows:

> "Section 402(a)(6) of the House amendment defined the term 'interstate or foreign commerce' with a view ot making the new proposed part IV apply to freight forwarding to and from points outside the United States, insofar as it took place within the United States. The definition was subject to problems of interpretation regarding the meaning of the word 'transshipment'. The conferees felt that it was not clear whether the term 'transshipment' meant the giving of a new bill of lading or the unloading and reloading of the property. The definition as agreed to in conference follows the provisions of part I of the Interstate Commerce Act. The term defined is 'interstate commerce' rather than 'interstate or foreign commerce', but the term is so defined as to include foreign operations by freight forwarders insofar as such freight forwarding 'takes place within the

[9] Committee of Conference report No. 2006, 77th Congress, Second Session, 21 (1942).

> United States'. This method of defining the Commission's jurisdiction will, it is believed, work out more satisfactorily than the method proposed in the House amendment."

The foregoing makes it clear that the "freight forwarding" brought under regulation was freight forwarding within the United States, whether in interstate or foreign commerce. It was not the "freight forwarding" conducted by those operators which consolidate their freight at a port of embarkation and perform the break-bulk at a port of debarkation in foreign commerce. Had the Congress meant otherwise, vastly different language would have been used.

3. The third question raised by this appeal is of tremendous importance to the carriers which are regulated by the Interstate Commerce Commission and which look to that agency for enforcement of the Interstate Commerce Act. The holding of the Court below is at war with the holdings of other three-judge courts in other circuits. See *Freight Forwarders Institute et al.* v. *United States,* 263 F.Supp. 460 (S.D.N.Y. 1967), and *Akers Motor Lines, Inc. et al.* v. *United States,* 286 F.Supp. 213 (W.D.N.C. 1968). Both of those cases involved review of orders entered by the Commission discontinuing proceedings initiated on its own motion. In both the Commission failed to dispose of certain material issues of fact and law. In the former of the two cases, the Court found that the Commission's failure was contrary to law and remanded the case to the Commission for a proper disposition. In the latter of the two cases, the Court said:

> "Drained of its procedural verbiage, the Commission's argument is that it is the plaintiff's burden, rather than the Commission's to enforce the trans-

portation laws. We take a higher view of statutory duty and agency function. 49 U.S.C.A. § 304 (a)(6). Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm.*," 386 F.2d 607 (3d Cir. 1967)

To be contrasted with that holding is the holding of the Court below in this cause:

> "The choice of an appropriate remedy in an ICC proceeding is properly entrusted to the expertise and discretion of the Commission."

4. The fourth and final question is one which ought to be resolved to remove what is obviously a misconception on the part of the Interstate Commerce Commission. In *Riss & Co.* v. *United States*, 341 U.S. 987 (1951), the Supreme Court held that applications for motor carrier operating authority, even though not required by statute to be disposed of only after an oral hearing if requested was nonetheless subject to section 5 of the Administrative Procedure Act [now 5 U.S.C. § 554]. The Commission has in the *Kingpak* proceedings given lip service to the *Riss* case by acknowledging that it may not lawfully dispose of an application for motor carrier operating authority without according the applicant a hearing when requested. In virtually the very next breath, the Commission has held that a protestant against the granting of such an application has no equivalent right to an oral hearing. The Court below has held that the announcement of the Commission's intention does not provide a vehicle for court review. The Court ignores the fact that a controversy here exists which ought to be settled on the merits now if for no other reason than to avoid extensive and needless litigation in the future.

CONCLUSION

The questions presented by this appeal are substantial and are of public importance. For the reasons stated, appellants urge that jurisdiction be noted and that the appeal be docketed for plenary review.

Respectfully submitted,

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